A

BUNYA JALONG v. PP

COURT OF APPEAL, KUCHING
ABDUL WAHAB PATAIL JCA
LINTON ALBERT JCA
ZAKARIA SAM JCA
B [CRIMINAL APPEAL NO: Q-09-212-08-2014]
26 MAY 2015
[2015] CLJ JT(8)

C ***CRIMINAL LAW:*** *Penal Code – Section 376 – Rape – Rape of 15-year old minor – Victim gave birth to baby – DNA analysis proved that accused was father of baby – Absence of penile penetration – Insertion of fingers laden with semen bearing spermatozoa into vagina – Whether conception could occur out of non-sexual intercourse activity – Whether offence of rape established – Whether victim a credible witness – Whether safe to convict upon uncorroborated testimony – Penal Code, ss. 376(1) and 376(2)(d)*

D ***CRIMINAL PROCEDURE:*** *Defence – Alibi – Accused charged with committing rape of victim in hotel room – Accused's name not registered in hotel register – Whether defence wrongly termed as one of alibi*

CRIMINAL PROCEDURE: *Trial – Joint trial – Whether four charges of rape*
E *involving same accused, victim, offence and place could be heard in one trial – Whether an illegality – Whether trial in breach of ss. 163, 164 & 165 Criminal Procedure Code (CPC) – Whether curable under s. 422 CPC*

EVIDENCE: *Corroboration – Rape – Rape of minor – Whether testimony of minor*
F *must be corroborated in every material particular – Whether conviction could be based upon uncorroborated testimony*

EVIDENCE: *Presumptions – Adverse inference – Rape – Rape allegedly occurred in hotel room – Accused's or victim's name not registered in hotel register – Whether giving rise to adverse inference – Failure to call inn-keeper – Whether there was withholding or suppression of evidence*

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The appellant, a 56-year old man, was alleged to have raped a 15-year old minor ('PW4') in a hotel room on four separate occasions and was, in consequence, charged with four counts of rape under ss. 376(1) and 376(2)(d) of the Penal Code. It was not in dispute that PW4 had subsequently given
H birth to a child, and that DNA evidence showed that it was the appellant who had fathered the child. This evidence notwithstanding, the appellant contended that he had not committed any crime in law as no penile penetration occurred in all the alleged incidents. According to the appellant, what transpired between him and PW4 on the four occasions was essentially
I that, both of them had touched and rubbed each other's private organs, and that upon his ejaculation, he and PW4 had inserted their semen-laden fingers into her vagina. A prosecution witness, one Dr Nurulhuda, an obstetrics and gynaecology specialist ('PW8'), testified that there was a possibility that conception could occur even without sexual intercourse as long as semen

bearing spermatozoa is introduced into the vagina, and further that, there was no need, in such a case, for any supervised medical process. The Sessions Court judge, having heard the charges and the evidence in one single trial, ruled that a beyond-reasonable-doubt case had been proved against the appellant on the charges, and in the event, convicted the appellant and sentenced him to a total of 15 years' imprisonment and 11 strokes of whipping. The appellant appealed to the High Court, and being unsuccessful thereat, appealed further. Before the learned justices of the Court of Appeal herein, questions were raised as to: (i) whether the fact that the hotel register did not show that the accused or the victim had checked into the hotel during the material time was fatal to the prosecution's case; (ii) whether PW4 was a credible witness, and in any case, whether her evidence had to be adequately corroborated; (iii) whether the High Court judge had erred in ruling that the misdirection on the part of the trial judge in saying that the defence was one of alibi was of no consequence; (iv) whether the courts below had failed to adequately appreciate the evidence of PW8; (v) whether the four charges here could be tried in one single trial; and (vi) whether the appellant had raised a reasonable doubt on the prosecution's case.

Held (allowing appeal; setting aside conviction and sentence)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The subject of the hotel register was raised to contradict the prosecution's case that the appellant had taken PW4 to the hotel and that the alleged rapes had occurred there, and not purely that the appellant could not have been the rapist as alleged because he was elsewhere. This being the case, that part of the defence pertaining to the appellant's name not being in the hotel register was incorrectly termed by the trial judge as a defence of alibi. Be that as it may, in the light of the conclusive DNA evidence that the appellant was the father of PW4's child, whether the incidents of rape was in the said hotel or elsewhere paled in significance, as the primary issue was whether PW4's child was the product of the alleged rapes by the appellant. (paras 24 & 26)

(2) The fact that in finding PW4 credible the trial judge did not appear to have considered certain facts that might have a bearing upon the finding was immaterial, as those facts did not have a determinative effect for a finding to the contrary. As for corroboration, it is not the law that the testimony of a victim or minor must necessarily be corroborated in every material particular. A trial judge may convict upon uncorroborated testimony if the trial judge, having warned himself of the danger of convicting upon such testimony, was nevertheless satisfied that it was safe to do so. (paras 33 & 35)

(3) The trial judge's decision pertaining to PW4's credibility, though replete with legal terms and phrases, was somewhat disjointed and disconnected as to appear muddled or incoherent in its reasoning. The finding of credibility of PW4, necessarily, was the result of the audio-visual

advantage which the trial judge had over PW4's demeanour. However, there was no record as to the demeanour of PW4. Without such record as a basis or reason, as provided under s. 271 of the Criminal Procedure Code ('CPC'), references to demeanour to support a decision suffered from the likelihood that it was more of an excuse to support the decision. Thus, the finding as to credibility of PW4 based upon demeanour from the audio-visual advantage of the trial judge was flawed and unsafe. (paras 52, 53, 56, 59 & 60)

(4) No adverse inference could be drawn upon the non-calling of the inn-keeper. An adverse inference could only be drawn if there was withholding or suppression of evidence and not merely on account of failure to obtain evidence. In was not shown that the non-calling of the inn-keeper, or the non-production of his evidence, was in any way attributable to withholding or suppression. (para 32)

(5) The trial of the appellant on the four charges was prohibited by ss. 164 and 165 of the CPC. Although the alleged incidents involved the same accused, same victim, same offence and same place, they were committed in different months and constituted separate offences of rape. The argument that time and expense would be saved by a joint trial of the charges could find no merit in the light of the specific provisions of s. 164 that only three offences of the same kind committed within the space of twelve months could be charged and tried together – or s. 165 that an accused could be charged and tried together only for offences that arose from one series of acts committed by one person so connected together as to form the same transactions. The four rapes, committed as they were over a four-month period, could not be seen as one transaction even if committed by the same accused upon the same victim and in the same place. When a trial is in breach of s. 163 and not saved by ss. 164 or 165 of the CPC, it constitutes an illegality and cannot be cured by s. 422 CPC. (paras 39, 44 & 45)

(6) Although PW8 had confirmed that fertilisation was possible by the delivery of fresh semen by fingers, the delivery of fresh semen by fingers was purely a supposition and would remain so if there was no testimony as to delivery by fingers. However, when the appellant testified that fingers had been used to rub and introduce freshly ejaculated semen, the possibility of fertilisation by such means was no longer a mere supposition. There was then evidence to be considered as to whether the testimony had or had not raised a reasonable doubt. (paras 67 & 68)

(7) Upon a maximum evaluation of the evidence, the supposition that fertilisation had occurred by the introduction or delivery of semen by fingers was no longer 'not in the least probable' but became a reasonable doubt. This is because, to the testimony of PW8 (that the appellant's version was possible), there was added the testimony of the appellant that fingers had actually been used. (para 75)

(8) Following PW8's testimony on the possibility of the fertilisation of the ova by way of introduction of fresh semen by fingers, no steps were taken by the prosecution to call a more experienced doctor to give evidence and explain the testimony of PW8. There was no excuse on the record for not obtaining expert evidence to counter the testimony. The Court, hence, was left with the one inference that the prosecution had accepted the said confirmation by PW8. (para 76)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, berumur 56 tahun, telah didakwa merogol seorang budak perempuan berumur 15 tahun ('SP4') di sebuah bilik hotel sebanyak empat kali, dan berikutnya telah dituduh dengan empat kesalahan rogol di bawah ss. 376(1) and 376(2)(d) Kanun Keseksaan. Tidak dinafikan bahawa SP4 kemudian telah melahirkan seorang bayi dan keterangan DNA menunjukkan bahawa perayu adalah bapa kepada bayi tersebut. Walaupun begitu, perayu mengatakan bahawa beliau tidak melakukan apa-apa kesalahan di sisi undang-undang oleh kerana, dalam semua kejadian berkenaan, tidak berlaku sebarang kemasukan zakar. Menurut perayu, apa yang berlaku antara beliau dan SP4 di keempat-empat kejadian adalah bahawa, kedua-dua beliau dan SP4 saling menggosok dan memegang alat-alat sulit mereka, dan setelah beliau mengalami ejakulasi, beliau dan SP4 telah memasukkan jari mereka yang berlumuran dengan air mani ke dalam faraj SP4. Seorang saksi pendakwaan, Dr Nurulhuda, yang merupakan pakar obstetrik dan ginekologi ('SP8'), memberi keterangan bahawa walaupun tanpa hubungan seksual, pensuburan mungkin berlaku jika air mani yang membawa spermatozoa dimasukkan ke dalam faraj, dan bahawa kes sedemikian tidak memerlukan sebarang proses perubatan yang terkawal. Yang arif hakim Mahkamah Sesyen, setelah mendengar pertuduhan dan keterangan dalam satu perbicaraan, memutuskan bahawa suatu kes di luar keraguan munasabah telah dibuktikan terhadap perayu atas semua pertuduhan, dan oleh itu, telah mensabitkan perayu dan menjatuhkan hukuman 15 tahun penjara dan 11 sebatan rotan ke atas perayu. Perayu merayu ke Mahkamah Tinggi, dan setelah gagal di situ, merayu seterusnya. Di hadapan yang arif hakim-hakim Mahkamah Rayuan di sini, persoalan-persoalan berikut telah diutarakan, iaitu: (i) sama ada fakta bahawa daftar hotel tidak menunjukkan tertuduh atau mangsa telah menginap di hotel pada waktu material telah memudaratkan kes pendakwaan; (ii) sama ada SP4 seorang saksi yang kredibel, dan walau apapun, sama ada keterangan SP4 perlu disokong secukupnya; (iii) sama ada hakim Mahkamah Tinggi khilaf apabila memutuskan bahawa salah arahan oleh hakim bicara apabila mengatakan bahawa pembelaan adalah satu pembelaan alibi, adalah sesuatu yang tidak menjadi hal; (iv) sama ada mahkamah-mahkamah di bawah gagal menilai keterangan SP8 dengan secukupnya; (v) sama ada keempat-empat pertuduhan di sini boleh dibicarakan dalam satu perbicaraan; dan (vi) sama ada perayu telah membangkitkan keraguan munasabah terhadap kes pendakwaan.

Diputuskan (membenarkan rayuan dan mengenepikan sabitan dan hukuman)

Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Hal perkara mengenai daftar hotel telah dibangkitkan bagi menentang kes pendakwaan bahawa perayu telah membawa SP4 ke hotel dan bahawa kesemua kejadian rogol yang didakwa tersebut berlaku di situ, dan bukannya semata-mata kerana perayu bukan orang yang merogol SP4 seperti yang didakwa kerana beliau berada di tempat lain. Dalam keadaan sedemikian, bahagian pembelaan yang menyentuhi ketiadaan nama perayu pada daftar hotel telah disalahertikan oleh hakim bicara sebagai satu pembelaan alibi. Walau bagaimanapun, mengambilkira keterangan konklusif DNA bahawa perayu adalah bapa kepada anak SP4, persoalan sama ada kejadian rogol berlaku di hotel tersebut atau di mana-mana sekalipun menjadi kurang penting, kerana isu utamanya adalah sama ada anak SP4 adalah hasil perlakuan rogol yang dilakukan oleh perayu.

(2) Fakta bahawa dalam mendapati SP4 sebagai boleh dipercayai hakim bicara kelihatannya tidak menimbang fakta-fakta tertentu yang mungkin boleh mempengaruhi dapatannya, adalah tidak material, memandangkan fakta-fakta tersebut tidak mempunyai kesan penentuan bagi suatu dapatan sebaliknya. Berhubung dengan keterangan sokongan, bukanlah menjadi undang-undang bahawa testimoni seorang mangsa atau kanak-kanak mesti disokong dari segala seginya. Seorang hakim bicara boleh mensabitkan berdasarkan testimoni yang tidak disokong jika, setelah mengingatkan dirinya tentang bahaya mensabit atas testimoni sedemikian, beliau masih berpuas hati bahawa ianya adalah selamat untuk berbuat demikian.

(3) Alasan penghakiman hakim bicara berkaitan kredibiliti SP4, walaupun dipenuhi terma dan ungkapan undang-undang, agak terputus-putus dan tiada kesinambungan serta kelihatan tidak koheren dan kusut pada taakulannya. Dapatan tentang kredibiliti SP4 pastinya berpunca dari kelebihan audio visual yang dimiliki oleh hakim bicara mengenai tingkah laku SP4. Namun, tidak ada sebarang rekod mengenai tingkah laku SP4. Tanpa rekod sedemikian seperti yang diperuntukkan oleh s. 271 Kanun Tatacara Jenayah ('KTJ') sebagai asas atau alasan, maka sebarang rujukan kepada tingkah laku bagi menyokong sesuatu keputusan hanya akan memberi gambaran tentang kemungkinan bahawa ia hanyalah satu alasan untuk menyokong keputusan. Oleh itu, dapatan hakim bicara mengenai kebolehpercayaan SP4 berdasarkan tingkah laku dan manfaat audio-visual beliau adalah cacat dan tidak selamat.

(4) Tiada inferens bertentangan boleh dibuat berkaitan kegagalan memanggil penjaga hotel sebagai saksi. Suatu inferens bertentangan hanya boleh dibuat jika terdapat penahanan atau penyorokan keterangan dan bukannya

hanya kerana kegagalan memperoleh keterangan. Tidak dibuktikan bahawa kegagalan memanggil penjaga hotel, atau mengemukakan keterangan tersebut, boleh dikaitkan dengan penahanan atau penyorokan. A

(5) Perbicaraan perayu atas keempat-empat pertuduhan adalah dilarang oleh ss. 164 dan 165 KTJ. Walaupun insiden-insiden berkenaan melibatkan tertuduh, mangsa, kesalahan dan tempat yang sama, ia dilakukan dalam bulan-bulan yang berbeza dan merupakan perbuatan-perbuatan rogol yang berasingan. Hujahan bahawa masa dan perbelanjaan boleh diselamatkan melalui satu perbicaraan bersama pertuduhan-pertuduhan adalah tidak bermerit, memandangkan terdapat peruntukan khusus dalam s. 164 bahawa hanya tiga kesalahan sama jenis yang dilakukan dalam tempoh dua belas bulan boleh dibicarakan secara bersekali – atau s. 165 yang mengatakan bahawa seseorang tertuduh hanya boleh didakwa dan dibicarakan secara bersama hanya bagi kesalahan-kesalahan yang berbangkit dari satu siri perbuatan yang dilakukan oleh seorang pelaku yang sangat berkaitan antara satu sama lain sehingga menjadikannya satu transaksi yang sama. Keempat-empat perbuatan rogol di sini, yang dilakukan dalam tempoh empat bulan, tidak boleh dianggap sebagai satu transaksi walaupun dilakukan oleh orang yang sama terhadap mangsa yang sama dan di tempat yang sama. Bilamana sesuatu perbicaraan itu melanggari s. 163 dan tidak dapat diselamatkan oleh ss. 164, 165 KTJ, ia menjadi satu ketaksahan dan tidak boleh diubati oleh s. 422 KTJ. B C D E

(6) Walaupun SP8 mengesahkan bahawa pensuburan boleh berlaku melalui kemasukan air mani melalui jari, kemasukan air mani melalui jari masih merupakan satu andaian dan akan kekal begitu jika tiada testimoni mengenai kemasukan melalui jari. Bagaimanapun, apabila perayu memberi keterangan bahawa beliau menggunakan jari untuk menggosok dan memasukkan air mani baru ke dalam faraj, kemungkinan pensuburan berlaku melalui cara tersebut bukan lagi merupakan satu andaian. Sudah wujud keterangan yang perlu ditimbang sama ada keterangan tersebut telah membangkitkan satu keraguan munasabah, ataupun tidak. F G

(7) Berdasarkan penilaian maksima keterangan, andaian bahawa pensuburan telah berlaku melalui kemasukan air mani melalui jari tidak lagi boleh dikatakan sebagai 'sangat tidak mungkin' tetapi telah menjadi satu keraguan munasabah. Ini kerana, kepada testimoni SP8 (bahawa versi perayu adalah satu kemungkinan), telah ditambah keterangan perayu bahawa beliau sememangnya telah menggunakan jari. H

(8) Ekoran pengesahan SP8 bahawa pensuburan ova melalui kemasukan air mani yang masih baru melalui jari mungkin boleh berlaku, tiada langkah dibuat oleh pendakwaan untuk memanggil seorang doktor yang lebih berpengalaman untuk memberi keterangan bagi menjelaskan testimoni I

A SP8. Tiada alasan pada rekod untuk tidak mendapatkan keterangan pakar bagi maksud membuat penyangkalan. Dalam keadaan sedemikian, hanya wujud satu sahaja inferens yang boleh dibuat oleh mahkamah, iaitu pendakwaan telah menerima pengesahan yang dibuat oleh SP8.

Case(s) referred to:

B *Amrita Lal Hazra & Ors v. Emperor [1915] ILR 42 Cal 957* ***(dist)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Babulal Chaukhani v. King Emperor AIR 1938 PC 130 ***(refd)***
Chiu Nang Hong v. PP [1964] 1 LNS 24 PC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2015] 2 CLJ 145 FC ***(refd)***
Datuk Haji Harun Haji Idris v. PP [1976] 1 LNS 19 FC ***(refd)***
C *Deepanraj Subramanian v. PP [2015] 3 CLJ 439 CA* ***(refd)***
Jagar Singh v. PP [1936] 1 LNS 25 HC ***(refd)***
Khoo Hi Chiang v. PP & Another Case [1994] 2 CLJ 151 SC ***(refd)***
Lim Guan Eng v. PP & Other Appeals [1998] 3 CLJ 769 CA ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 2 MLJ 65 ***(refd)***
D *Miller v. Minister of Pensions [1947] 2 All ER 372* ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(foll)***
Mohd Khir Toyo lwn. PP [2013] 5 CLJ 323 CA ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Muthan v. PP [1947] 1 LNS 70 HC ***(refd)***
PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***
E *PP v. Dato' Saidin Thamby [2012] 4 CLJ 15 CA* ***(refd)***
PP v. Ku Lip See [1980] 1 LNS 166 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Ridzuan Kok Abdullah [1996] 2 CLJ 346 HC ***(refd)***
Ramachandran & Anor v. PP [1991] 1 LNS 82 CA ***(refd)***
Romi Amora Amir v. PP [2011] 1 CLJ 870 CA ***(refd)***
F *Saw Tuan Cheong v. PP [1946] 1 LNS 31 PC* ***(refd)***
State Public Service Commission, Sarawak v. Sarjit Singh Khaira [2000] 4 CLJ 245 FC ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***
Tara Singh & Ors v. PP [1948] 1 LNS 70 HC ***(refd)***
Yap Liow Swee v. PP [1937] 1 LNS 93 HC ***(refd)***

G **Legislation referred to:**
Criminal Procedure Code, ss. 39B(1)(a), 163, 164, 165(1), 166, 170, 180, 271, 402A, 422
Dangerous Drugs Act 1952, s. 6
Federal Constitution, art. 121(1)
Penal Code, s. 376(1), (2)

H Explosive Substances Act 1908 [Ind], s. 4(b)
Penal Code [Ind], s. 120B

For the appellant - Augustine Liom; M/s Tang & Co
For the respondent - Nahra Dollah; DPP

I *[Editor's note: Appeal from High Court, Sibu; Criminal Appeal No: SBW-425-2-11-2013 (overruled).]*

Reported by Wan Sharif Ahmad

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellant, Bunya Anak Jalong (I/C No: 541004-13-5351) appealed against the dismissal by the High Court in Sibu of his appeal against his convictions by the Sessions Court in Sibu and the sentences as varied by the said High Court on four charges of rape as follows:

(a) first charge: reduced to eight years' imprisonment;

(b) second charge: reduced to three years' imprisonment;

(c) third charge: reduced to two years' imprisonment; and

(d) fourth charge: reduced to two years' imprisonment.

The Charges

[2] The appellant was charged, tried, convicted and sentenced before the said Sessions Court on the following charges:

(a) Pertuduhan Pertama Bahawa kamu, pada hujung bulan Mei tahun 2011, jam lebih kurang diantara 2.00 petang hingga 3.00 petang, bertempat di dalam sebuah bilik To-Day Hotel, No. 40 Jalan Kpg Nyabor, Sibu, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah merogol XXX (P), No. Kad Pengenalan: XXX, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376(2)(d) Kanun Keseksaan.

(b) PERTUDUHAN KEDUA Bahawa kamu, dalam bulan Jun tahun 2011, jam lebih kurang diantara 2.00 petang hingga 3.00 petang, bertempat di dalam sebuah bilik To-Day Hotel, No. 40 Jalan Kpg Nyabor, Sibu, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah merogol XXX (P), No. Kad Pengenalan: XXX, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376(1) Kanun Keseksaan.

(c) PERTUDUHAN KETIGA Bahawa kamu, dalam bulan Julai tahun 2011, jam lebih kurang diantara 2.00 petang hingga 3.00 petang, bertempat di dalam sebuah bilik To-Day Hotel, No. 40 Jalan Kpg Nyabor, Sibu, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah merogol XXX (P), No. Kad Pengenalan: XXX, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376(1) Kanun Keseksaan.

(d) PERTUDUHAN KEEMPAT Bahawa kamu, dalam bulan Ogos tahun 2011, jam lebih kurang diantara 3.00 petang hingga 4.00 petang, bertempat di dalam sebuah bilik To-Day Hotel, No. 40 Jalan Kpg Nyabor, Sibu, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah merogol XXX (P), No. Kad Pengenalan: XXX, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376(1) Kanun Keseksaan.

[3] The Penal Code provides a punishment upon conviction of a term of imprisonment which may extend to twenty years, and of imprisonment for a term of not less than five years and not more than thirty years in the case of the offences under s. 376(1) and s. 376(2) respectively, and in both cases the offender shall also be liable to whipping.

Basic Principles Of Criminal Law

[4] As in the case of consideration of every criminal appeal, we bear in mind the following, as should every investigator, prosecutor and member of the public.

[5] So that the traumatic experience of any offence can be put to rest, victims of offences, persons affected directly or indirectly, and right-thinking persons expect offenders to be punished. But few offences attract such utter revulsion and outrage as rape, an offence not only of a physical assault but also upon the gender and psyche of the victim, whether adult or a child. It must be a permanent blot upon the offender's character and reputation. Every right-thinking person is anxious to see to it the offender is punished, that justice is served and the victim compensated.

[6] The criminal law recognises the danger that the desire to punish an offender can result in an innocent person accused of an offence being punished. The "*Blackstone Ratio*", attributed to English jurist William Blackstone, in his *Commentaries on the Laws of England* published by the Clarendon Press, Oxford between 1765-1769 is widely summed up as that "it is better that ten guilty persons escape than that one innocent person shall suffer".

[7] That balancing between that offenders must be brought to justice and no innocent person shall suffer is achieved by (a) structuring of the administration of the criminal law, and (b) the standard of proof.

[8] The administration of justice is structured as follows:

(a) the investigators;

(b) the prosecutor; and

(c) the trial court.

[9] The duty of the investigators is to investigate the facts and to collect all the evidence. The police as investigators are public officers. Their concern must be to investigate the facts without fear or favour, so that all wrongdoers may be brought to justice. The completed investigation, compiled in the investigation papers is referred to the Public Prosecutor if an offence is disclosed. A completed investigation is one that includes investigation of the defences that emerged from the investigation. This includes such gaps or weaknesses emerging from the statements of witnesses and of defences from the statement of the accused person. Such investigations

may eliminate the gaps or weaknesses, and provide substance to be tested against defences when raised. This is important as it ensures that if charges are to be preferred, there are no gaps or weak links in the prosecution case in the way of a successful prosecution.

[10] The role of the Public Prosecutor is quasi-judicial. It is to:

(a) review the evidence in the investigation papers;

(b) determine if the evidence in the investigation papers proves beyond reasonable doubt that an offence had been committed; and

(c) authorise the charges upon which the accused is to be charged and punished.

[11] This quasi-judicial function is essential, because a decision to prosecute necessitates the accused to incur time and legal expense to defend himself, but for which there is no provision that he can recover costs if he is acquitted. For this reason, and to ensure there can be no doubt the decision was to prosecute and not persecute, there is the responsibility for the Public Prosecutor to be satisfied that there is an offence according to law and that the investigation papers contain proof beyond reasonable doubt. The notion of "if in doubt, prosecute and leave it to the court" is not only abandonment of that quasi-judicial function in the exercise of the absolute discretion to prosecute but also exposes prosecution to falling conviction rates. If the Public Prosecutor itself is in doubt, what court could conceivably find an accused, defended by counsel, guilty?

[12] Ensuring that an innocent man does not run risk of being victimised or harassed by wrong exercise of powers of prosecution:

(a) there must be charge for an offence known to the law; and

(b) that the facts constituting the offence are proved to the standard of proof of "proved beyond reasonable doubt".

[13] If the accused pleads not guilty to the charges preferred against him, a trial is held. The purpose of the trial is to enable the trial court not only to see and hear the oral and/or documentary evidence relied upon by the prosecution and produced to the court:

(a) but also to see and hear that evidence being tested in cross-examination by or on behalf of the accused;

(b) and assisted by submissions of the parties, to conduct a maximum evaluation of the evidence to decide on the credibility of prosecution witnesses and appreciate the oral and documentary evidence in order to decide whether, at the end of the prosecution's case, the prosecution had made out a *prima facie* case, and if so, to call the accused to enter upon his defence; and

A (c) at the end of the defence case, to conduct a maximum evaluation upon the whole of the evidence to decide whether the prosecution had proved its case beyond reasonable doubt. In simple language, it means whether at the end of the defence's case, the defence had succeeded to raise a reasonable doubt in the *prima facie* case made out by the prosecution at
B the end of this case.

See s. 180 Criminal Procedure Code (CPC).

[14] Ensuring that the courts do not run the risk of convicting and punishing an innocent person accused of an offence with taking away of his
C life, liberty and/or property:

(a) there must be charge for an offence known to the law; and

(b) that the facts constituting the offence are proved to the standard of proof of "proved beyond reasonable doubt".

D **[15]** That there first must be an offence known to the law is underlined by art. 121(1) of the Federal Constitution that "... the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law". Unlike the courts of England in their common law jurisdiction, the courts in Malaysia cannot "recognise" a law as existing and
E to impose it.

[16] In a criminal trial, the facts constituting the ingredients of the offence as charged must be proved by admissible oral and/or exhibit evidence, produced and admitted into evidence before the court. See Evidence Act 1950. And to convict requires that the facts be so proved to the standard of
F proof of "proved beyond reasonable doubt". The accused is given a fair opportunity to (a) test the evidence adduced, and (b) to lay out the foundation of his defence to relevant prosecution witnesses, and if called to enter upon his defence, to be heard in his defence. Laying out a defence to relevant prosecution witnesses not only (a) allows the defence to be tested by the
G prosecution, but also (b) gives notice to the prosecution and eliminates the defence from being labelled and dismissed as an afterthought, and may thereby accord the defence just enough credibility to raise a reasonable doubt in the prosecution case.

[17] The burden of proof lies at all times upon the prosecution. It is firmly
H established that the evaluation is upon a maximum evaluation. See *Khoo Hi Chiang v. Public Prosecutor & Another Case* [1994] 2 CLJ 151; [1994] 1 MLJ 265; *Arulpragasan Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597; *Looi Kow Chai & Anor v. PP* [2003] 2 MLJ 65; *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 FC; *Romi Amora Amir v. PP* [2011] 1 CLJ 870 CA.

I **[18]** Section 180 of the CPC requires the prosecution to make out, upon a maximum evaluation, a *prima facie* case. Unless a prosecution witness recants upon his testimony or his credibility is destroyed, his testimony is taken into

the consideration of whether a *prima facie* case has been made out, even though his testimony was challenged in cross-examination by putting to him that his testimony or any identified part thereof was untrue, incorrect or contradicted by other evidence, oral and/or documentary. If the evaluation of his answers and how he answers that determines his credibility, which may result in there being a finding there remained a gap or a reasonable doubt in the prosecution case, and which may be fatal to a conviction. Only if the court finds that the prosecution had made out a *prima facie* case is the accused called to enter upon his defence, where the accused is entitled to tender oral and/or exhibit evidence to provide substance to his defences and the questions put on his behalf to the prosecution witnesses. If sufficient to raise a reasonable doubt, he is entitled to be acquitted and discharged.

[19] Proof beyond reasonable doubt is therefore not driven by prejudices, emotions, feelings, outrage, demands or beliefs, but is necessarily and objectively grounded upon oral and/or exhibit evidence proving the facts constituting the offence as charged. At the end of the trial, a maximum evaluation is again conducted upon the whole of the oral and/or exhibit evidence, to consider whether the case for the defence succeeded to raise a reasonable doubt, and if so, the accused is entitled to an acquittal.

The Appeal Before This Court

[20] We reproduce below the main parts of the grounds of appeal set out by the appellant:

> 1 1.1 The Learned High Court Judge had failed to appreciate adequately, properly or at all the effect and impact to the case of the fact that neither the Appellant's nor PW4's name were ever registered as guest(s) in To-Day's Hotel Register, in particular, as follows: ...
>
> 1.2 The Learned High Court Judge had erred in law and in fact when she said the direct evidence of PW4 that the rape occurred in To-Day Hotel sufficiently rebutted the presumption that she and the Appellant had not been guests at the hotel or that the accused had never taken her to To-Day Hotel, when that evidence of PW4 itself would be rendered untrue by the fact which triggered the presumption i.e. the fact that the names of PW4 and the Appellant were not found in the Hotel Register and when the truth of what PW4 has said was itself in issue and in question because it contradicts the Hotel Register which was a contemporary document and when the Hotel Register would show her evidence that she was taken to To-Day Hotel to be untrue.
>
> 1.3 The Learned High Court Judge had seriously erred in fact and in law when she held it was unnecessary to call the Inn-keeper because all they would come up with was the already known fact that "the name of the accused was not found" in the Register when what the Inn-keeper was required to explain was why, if the accused and PW4 had been to To-Day Hotel, their

A names were not in the Hotel Register at all. Further, the Learned High Court Judge and the Trial Judge have both failed to consider the likelihood that the Inn-keeper, if called, will confirm the fact revealed by the Hotel Register that PW4 and the accused had never been to To-Day Hotel.

B 1.4 The Learned High Court Judge had erred in fact and in law in failing to hold that the prosecution had failed to rebut the statutory presumption.

1.5 The Learned High Court Judge had erred in not having sufficiently taken into account a fact favourable to the accused i.e. the absence of his and PW4's name in the Register would C show the accused's version is true that he and PW4 had not been to To-Day Hotel.

1.6 The Learned High Court Judge and the Learned Trial Judge have both failed to appreciate that the Hotel Register would render the evidence of PW4 untrustworthy, doubtful and D unreliable on a core issue at the trial.

1.7 Both the Learned High Court Judge and the Trial Judge have failed to take into account the fact that PW4 was unable to tell the police the name of the hotel she had been to despite the fact that the hotel's name prominently appeared and shown at E its entrance and she was then already a Form 3 student and that it was only when she was taken around by the I.O. on a patrol around Sibu town that she pointed out a hotel ie, she had to point out a hotel when she was taken for a drive around by the police. But then that Hotel Register did not contain her or the accused's name.

F 2. The Learned High Court Judge had erred in law and in fact when she said it was of no consequence that the misdirection, if any, on the part of the Trial Judge in saying the defence was one of alibi and hence in deciding that a Notice of Alibi was required and that because there was no such notice it is fatal to the defence because G such misdirection by the Trial Judge has led to a failure of the Trial Judge to consider invoking the presumption under S.114 of the Evidence Act and the failure to appreciate that the Hotel Register would show PW4's evidence to be untrue or is not credible and conversely that the evidence of the Appellant to be true as it is supported by the Hotel Register.

H 3. Both the Learned Trial Judge and the Learned High Court Judge on appeal have failed to appreciate adequately and properly or at all the evidence of the Dr. Nurulhuda Binti Samsudin, Obstetrics & Gynaecology Specialist (PW8) when she said that in a normal case where the woman is fertile and the man is fertile conception can I occur as long as semen bearing spermatozoa is introduced into the vagina, (Q15 of cross-examination of PW8 at page 100 of AR) and when she also said there was no need in such a case for supervised

medical process as in the intrauterine insemination (Q16 of cross-examination of PW8 at page 101 of AR), and the effect of that expert evidence, in particular, as follows:

(i) That such evidence would corroborate the accused's evidence and would render it not an incredible story but a reasonable and probable story;

(ii) That such evidence would provide no corroboration to PW4's evidence because it would also corroborate the accused's evidence;

(iii) That such evidence would render neutral the effect of the DNA report of the chemist because it would show that conception of the child would not necessarily be by sexual intercourse but also could be by non-sexual intercourse activity as given in evidence by the accused i.e. the insertion of the finger laden with semen bearing spermatozoa into the vagina.

3.1 Both the courts below have erred in failing to appreciate that the evidence of PW8 relating to intrauterine insemination which required medical facilities and supervision and which success rate is very low applies only to couples having difficulty in bearing a child because either one of them is infertile and is not applicable to normal couples who are fertile.

3.2 The Learned High Court Judge had erred in law and in fact when she said:

Furthermore, there simply is no evidence that the Appellant and PW4 were a fertile couple when the approach ought to have been to ask whether there was evidence that they are not normal couple and are infertile. In the absence of such evidence that they are infertile or had difficulty in bearing a child, they should have been taken as being normal couple having no difficulty in bearing a child and that such conception of a child for them could occur even with non-sexual intercourse activity which is what PW8 has said.

3.3 The Learned High Court Judge had failed to appreciate adequately or at all that the Trial Judge had erred when he said "However, we must bear in mind that PW8 has clarified that conception without sexual intercourse is not easy as it needs medical equipment" when PW8 never said that but had said to the contrary i.e. in a normal case conception can occur without supervised medical process and that therefore the Trial Judge had used something which PW8 never said in finding PW4 evidence reliable and conversely in finding the accused's evidence not reliable.

4. The Learned High Court Judge had failed to appreciate adequately or at all the materiality of the absence of any finding by the Learned Trial Judge on whether the alleged offences in the 2nd, 3rd and 4th charges were with or without the consent of PW4 because this issue

would go to affect the entire credibility of PW4 as a witness and whether her entire evidence can be relied on or whether it was conversely a made-up story and she being rendered an unreliable witness and further whether she had told an inherently incredible story in court when she said all the four incidents were by force and without consent and all had occurred in exactly the same manner i.e. a story contradicted by what she had told the I.O. i.e., for the three incidents she had consented which led to those three charges being under s. 376(1) and not under s. 376(2)(d).

5. The Learned High Court Judge had erred in ruling that the misdirection on the part of the Trial Judge when he said PW4 had told of the other incidents not long after telling of the incident in August 2011 is not fatal when that finding of "not long after" telling of the incident in August, 2011 to PW3 and PW13 formed the very basis for the Trial Judge to find PW4 a credible witness (paragraph 16 of the Ground of Decision of the Sessions Court Judge at page 369 and 340 of the AR) and that basis of the Trial Judge's finding by the misdirection does not exist in fact.

6. The Learned High Court Judge ought to have realized that the Learned Trial Judge had erred in finding that PW4 was a credible or convincing witness when ....

7. The Learned Trial Judge and the Learned High Court Judge have failed to take into account sufficiently or at all the evidence and facts which are favourable to the accused and the details of the evidence of the accused in his defence in particular; ...

8. The Learned Trial Judge and the Learned High Court Judge have failed to critically evaluate and scrutinized the entire evidence of PW4 including the fact that it is not adequately corroborated or at all and have failed to take into consideration the matters listed in paragraph 6(1)-(12) above.

9. The Learned Trial Judge and the Learned High Court Judge have failed to realize that the prosecution has failed to prove its case beyond any reasonable doubt and that the defence has raised a reasonable doubt in the prosecution case and that the defence story can reasonably and probably be true.

10. The Learned High Court Judge had erred in fact and in law in failing to find and to hold that the trial of all four (4) charges of rape together in one trial was a contravention of the mandatory prohibition of the Criminal Procedure Code and in failing to hold that the trial was a nullity particularly when dealing with the appeal against sentence she had said the offences were separate and distinct offences which therefore means they could not all be tried together in one trial.

11. The Learned High Court Judge had erred in ordering the imprisonment sentence to run consecutively when she had found that the offences were committed in the same transaction and when the trial Court had passed a concurrent sentence.

12. The sentence of whipping to a total of 11 strokes is too excessive (*sic*). A

13. The court below had erred in ordering compensation to PW4 when it is inappropriate in the circumstances and when there was no consideration at all to the means of the accused to pay such huge compensation and where there was no proper assessment of the damages that has occurred to PW4 and when the ordering of compensation would turn the criminal court to exercise the function of a civil court. The accused ought not to be further burdened when he has been sufficiently sentenced to imprisonment and to whipping. In any case, the compensation ordered is too excessive in the circumstances. B C

The Issues

[21] The learned Deputy Public Prosecutor ably summed up the prolix and repetitive grounds of appeal and set out the issues as follows:

Issue 1: Whether the fact that the Hotel Register did not show that the accused or the victim had checked into the hotel during the material time was fatal to the prosecution's case. D

Issue 2: Whether PW4 was a credible witness.

Issue 3: Whether the learned High Court Judge had erred when deciding that it is of no consequence that the misdirection, if any, on the part of the trial judge in saying the defence was one of alibi. E

Issue 4: Whether the learned trial judge and the learned High Court Judge failed to appreciate the evidence of PW8 that conception without sexual intercourse could occur. F

Issue 5: Whether PW4's evidence was not adequately corroborated.

Issue 6: Whether the four charges can be tried at one trial.

Issue 7: Whether the appellant had raised a reasonable doubt to the prosecution's case. G

[22] We proceeded to address the issues as follows with the grounds of appeal in mind.

[23] In this case, the victim, then below the age of 15 years, became pregnant and gave birth to a child on 5 February 2012 whose DNA proves H conclusively that the appellant is the father. The appellant at the time of the alleged first offence was 56 years 7 months. The DNA evidence that he is the father of the child of the victim then aged below 15 years provided compelling evidence that the appellant had committed the alleged rapes as charged and must be punished as provided by law. We used the term alleged I rapes for it is a fundamental principle of the criminal law that a person is deemed innocent until proven guilty.

A *Issue 3*

[24] Issue 3 concerned what the trial judge termed as a defence of alibi. The defence that the name of the appellant was not registered in the register of the To-Day Hotel was, in our view, incorrectly termed in this case as a defence of alibi since the subject was brought up to contradict the prosecution case in the charges that the appellant took PW4 to the To-Day Hotel and that the alleged rapes occurred there, and not purely that the appellant could not have been the rapist as alleged because he was elsewhere.

[25] The defence of alibi is about evidence that an accused was elsewhere at the time and occurrence of an alleged offence, and therefore notice must be given under s. 402A of the CPC to give opportunity to the Public Prosecutor to verify the evidence of witnesses listed in the notice of alibi as to whether the accused had raised a reasonable doubt as to where he was.

[26] Since the High Court on appeal had accepted it was not a defence of alibi, the question now is whether the error on the part of the trial judge was material. In the light of the conclusive DNA evidence that the appellant was the father of PW4's child, whether the incidents of rape by the appellant against PW4 was in the To-Day Hotel or elsewhere pales in significance, as the primary issue is whether PW4's child is the product of the alleged rapes by the appellant. The date, time and place in a charge are to assist the accused in preparing his defence, but unless it is demonstrated an accused is prejudiced in the conduct of his defence, differences arising from approximations in dates, times and places are not, by themselves, so prejudicial as to render a conviction fatal.

Issue 1, Issue 2 And Issue 5

[27] Issue 1, Issue 2 and Issue 5 are intertwined.

[28] Issue 1 and Issue 2 concern the finding of credibility of the victim XXX (PW4) that she was raped in the To-Day Hotel at No. 40 Jalan Kpg Nyabor, when the register of the To-Day Hotel which the inn-keeper is obliged by law to maintain, did not record the names of the appellant and PW4.

[29] It was submitted for the appellant that an adverse presumption ought to be drawn for the failure to call the innkeeper to explain the absence of the names of the appellant and PW4 in the register of the To-Day Hotel.

[30] Upon consideration of Issue 1, we observed that whether their names were recorded or not was the act of the inn-keeper and not the appellant, and the inn-keeper may have had reasons of his own. If he had reasons for the non-registration of the appellant's and PW4's names, then the fact they were not registered does not mean they were not there. But the inn-keeper was not called. Now, while if the inn-keeper was called and the matter could be explained, the absence of evidence that the prosecution had the evidence of the inn-keeper but chose to suppress it, renders the drawing of an adverse presumption to be a judicial discretion that is not judicially exercised.

[31] In *Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, it was held by the Supreme Court that: A

> It is essential to appreciate the scope of section 114(g) lest it be carried too far outside its limits. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document but material document by a party in possession, or for non-production of not just any witness but an important and material witness to the case. B

[32] Since an adverse inference can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence, find no error in not drawing an adverse inference. It was not shown from examination of other witnesses that such evidence was taken so that non-production can only be reasonably attributed to withholding or suppression. In the absence of an adverse presumption, the finding as to whether they were in the To-Day Hotel must necessarily be drawn from other evidence. In this case, it is that of the victim, PW4. C D

[33] The learned trial judge had found PW4 to be a credible witness. The credibility of PW4 was an issue before the learned trial judge, who was required and therefore entitled to find PW4 credible or not and to accept or reject her testimony in whole or any part of it. The fact that in finding PW4 credible the learned trial judge did not appear to have considered certain facts that might have a bearing upon the finding, is immaterial where the certain facts do not have a determinative effect for a finding to the contrary. A finding of credibility is distinct from a finding of the accuracy of the testimony, and testimony may be accepted in one part yet not in another, since findings of fact are arrived at upon a maximum evaluation of all the evidence adduced and admitted into evidence before the court, be it at the prosecution stage or if the defence is called, at the end of the defence case. E F

[34] Since for the reasons we have given earlier above that the absence of the names of the appellant and PW4 in the To-Day Hotel register do not have a determinative value as evidence as to whether they were or were not in the To-Day Hotel, the issue does not render the reasoning in the grounds of decision defective. G

[35] Issue 5 is as to corroboration of the testimony of PW4. It is not the law that testimony of a victim or minor must necessarily be corroborated in every material particular. Indeed a trial judge may convict upon uncorroborated testimony if the trial judge, having warned himself of the danger of convicting upon uncorroborated testimony, he was nevertheless satisfied it was safe to do so on the uncorroborated testimony: see for example *Chiu Nang Hong v. Public Prosecutor* [1964] 1 LNS 24 PC; *Ramachandran & Anor v. Public Prosecutor* [1991] 1 LNS 82 CA; *Datuk Haji Harun Haji Idris v. Public Prosecutor* [1976] 1 LNS 19; *PP v. Dato' Saidin* H I

A *Thamby* [2012] 4 CLJ 15 CA; *Deepanraj Subramanian v. PP* [2015] 3 CLJ 439 CA; *Mohd Khir Toyo lwn. PP* [2013] 5 CLJ 323 CA; *Lim Guan Eng v. Public Prosecutor & Other Appeals* [1998] 3 CLJ 769 CA.

[36] The significance of the DNA evidence that the father of the child borne by PW4 cannot be underestimated. It provided conclusive evidence
B that the spermatozoa of the appellant fertilised the ova of PW4 within her. But as we have observed earlier above, the question is whether the fertilisation of PW4 ova by the appellant's spermatozoa was as a consequence of the alleged rapes as charged. This brings the matter to the incidents of alleged rapes we will address in Issue 4 and Issue 7 below.

C *Issue 6*

[37] Issue 6 pertains, if it is sustainable, to the validity of the trial proceedings in respect of the four charges.

[38] Section 164 of the CPC provides that:

D

> 164 Three offences of the same kind within twelve months may be charged together.
>
> (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to
E the last of such offences, whether in respect of the same person or not, he may be charged with and tried at one trial for any number of them not exceeding three.
>
> ...

[39] The four offences the appellant was charged with are rapes. They are
F four offences of the same kind and within 12 months. The trial of the appellant on the four charges was prohibited by s. 164 which limits the number of offences of the same kind he may be charged and tried with in one trial to three, regardless whether in respect of the same person or not.

[40] It was submitted by learned Deputy Public Prosecutor that the
G charges, trial and convictions fell within s. 165 which does not limit the number of offences to three.

[41] Section 165(1) of the CPC provides that if in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one
H trial for every such offence:

> (1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.
>
I ...

[42] In *Public Prosecutor v. Ridzuan Kok Abdullah* [1996] 2 CLJ 346, the High Court addressed the question of joinder of two charges for offences of trafficking under s. 39B(1)(a) and possession under s. 6 of the Dangerous

Drugs Act 1952 alleged to be committed on 25 December 1992 at about 1.45am at No 5, Jalan Rantai 5, Taman Kobena, Tampoi, in the District of Johor Bahru. Section 164 of the CPC was not referred to as the offences were not of the same kind. The High Court applied the test in *Amrita Lal Hazra & Ors v. Emperor* [1915] ILR 42 Cal 957, where four accused persons were charged with an offence under s. 4(b) of the Explosive Substances Act, Act VI of 1908, while all the six accused persons were charged with conspiracy under s. 120B of the Indian Penal Code. It was contended that a joint trial of all these persons for the two offences charged was illegal. In dismissing the contention, it was held:

> It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated: they are proximity of time, unity or proximity of place, continuity of action and community of purpose or design.

[43] We found little assistance from *Amrita Lal Hazra & Ors v. Emperor* which concerned four accused persons being tried together.

[44] We observed that s. 164 pertains to "offences of the same kind ... whether in respect of the same person or not ...", while s. 165 pertains to "... one series of acts so connected together as to form the same transaction more offences than one are committed by the same person ...", and both these are exceptions to s. 163 which ensures that an accused is in no doubt or confusion as to the particular offence for which he is charged and tried and must defend himself against. Though the alleged incidents in this case, regardless the incidents were in different months, involve the same accused, same victim, same offence and same place, they involve separate offences of rape. That the charges involve the same witnesses and evidence, and time and expense would be saved by a trial of the four charges together, find no merit in the light of the specific provisions of s. 164 that only three offences of the same kind committed within the space of 12 months may be charged and tried together, and s. 165 that an accused may be charged and tried together for offences that arose from one series of acts committed by one person so connected together as to form the same transaction. We failed to see how four rapes, and over four separate months, can be seen as one transaction even if by the same accused upon the same victim and in the same place.

[45] We observed also the reference in *PP v. Ridzuan Kok Abdullah* (*supra*) to *Babulal Chaukhani v. King Emperor* AIR 1938 PC 130 that the court must determine whether the acts were committed in the same transaction or not at the time the charge was framed and not at the end of trial. This is for the reason that s. 163 of the CPC provides that for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in ss. 164, 165, 166 and 170. Therefore, when a trial is in breach of s. 163 and not saved by

A s. 164 or s. 165 of the CPC, it constituted an illegality which cannot be cured under s. 422 of the CPC. (See *Jagar Singh v. Public Prosecutor* [1936] 1 LNS 25; [1936] 1 MLJ 92, *Yap Liow Swee v. Public Prosecutor* [1937] 1 LNS 93; [1937] 1 MLJ 225; *Saw Tuan Cheong v. Public Prosecutor* [1946] 1 LNS 31 and *Muthan v. Public Prosecutor* [1947] 1 LNS 70; [1947] 1 MLJ 86).

B *Issue 4 And Issue 7*

[46] The police case began with a Police Report SIBU/002281/12 made on 5 March 2012, by XXX (PW3), the mother of PW4:

> Pada 05.02.12 jam lebih kurang 1330 hrs anak saya XXX kpt: XXX
C (15 tahun) mengadu sakit perut. Lalu saya membawanya ke Hospital Sibu. Tidak lama sampai di Hospital Sibu anak saya itu telah bersalin dan melahirkan seorang bayi lelaki. Setelah disoal anak saya memberitahu Bunya ak Jalong yang telah menyebabkannya mengandung. Disebabkan itu saya membuat Laporan Polis untuk siasatan dan tindakan selanjutnya. Sekian laporan saya.

D **[47]** The police report was made by PW3 one month after the birth of the child. PW4 told PW2, PW3 and PW13 that the rape occurred in August 2011. Later PW4 narrated three other incidents of rape to PW3 and PW13.

[48] The trial judge had at this point only set out the charges, described the
E number of witnesses, ingredients to be established, ruling at the end of the prosecution's case, calling the appellant to enter upon his defence, duty to consider whether prosecution had proved its case beyond reasonable doubt, what reasonable doubt means, and said:

> 10. At the end of Trial, after having considered all the evidence to a
F maximum evaluation the Court was satisfied that the Prosecution has proved its case beyond reasonable doubt.

[49] We reproduce the grounds of decision of the trial judge at some length in order that it is appreciated how the trial judge arrived at his decision. After summarising briefly the testimony of PW4, the grounds of decision
G continued as follows (at pp. 368 to 379 of rekod rayuan jilid 3):

> 15 ...
>
> The evidence of PW4 was consistent even though she was vigorously cross-examined for a few days. I have no hesitation to agree with the Prosecution that to say that the victim was making up a story is totally
H unacceptable.
>
> ...
>
> I am satisfied that the element of penetration is sufficiently established in all the charges against the Accused. The Defence cross-examination on PW4 had not in any event dislodge the Prosecution's case.
I
> 16. Now, the question is does PW4 is a credible witness? I am satisfied that there is nothing in defence evidence can discredit the truthfulness of PW4 of being a victim of rape by the Accused.

The defence disputed on the inconsistencies of the victim statement to PW2, PW3 and PW13 especially to the number of incidents narrated which is varied.

There was a time where the victim only narrated of only one Incident to PW2, PW3 and PW13. However, it was not long after she narrated of only one incident that she narrated the other 3 incidents to PW3 and PW13.

I agree that the inconsistency in this case is reasonable and does not affect the prosecution's case and it also does not change the fact that the accused had penetrated his penis into the victim's vagina. After all PW4 had duly explained that she was in a trauma, too embarrassed to tell the whole story and afraid of being scolded by her parents.

17. Scrutinizing the defence evidences, the accused shifted the blame on PW4 and the Accused denied of having sexual intercourse with PW4 and the Accused shifted the blame on PW4 for "inserting her finger laden with the accused semen into her vagina".

The Accused line of defence is that the pregnancy of the victim was not due to penile penetration. The defence rely on PW8 (Dr Nurulhuda) saying that there is possibility that conception can occur even without sexual intercourse. However, we must bear in mind that PW8 had clarified that the conception without intercourse is not easy as it needs sufficient medical equipment.

The Defence relied heavily on what purportedly transpired at the toilet of YMCA Resort between the Accused and PW4. The accused had denied any sexual intercourse with PW4 but admitted of masturbation by PW4 on the Accused on 12.06.2011 at the toilet of YMCA Resort. The Accused ejaculated with his semen smearing PW4 fingers and his own finger which later were inserted into PW4's vagina.

18. The Defence also submitted that the hotel register provided unwittingly an alibi to the Accused, that is, it shows he was not at the place where the offences were alleged to have been committed in May, June, July and August 2011.

...

19. Further, the Defence submitted that it is unsafe to find for the Prosecution solely on the evidence of PW4 without corroborative evidence.

20. Generally in Malaysia there is no specific rule of law that requires the evidence of a witness to be corroborated except in the case of the evidence of a child of tender years under section 133A of the Evidence Act.

21. However, In *PP v. Ku Lip See* [1981] 1 LNS 155, Federal Court ruled that the Court can rely on the testimony of the rape victim in convicting the accused.

...

A 23. In any event, for the instant case I accepted the evidence of PW4 that she was raped by the Accused and it was corroborated by the medical evidence.

The DNA report which concluded positively that the Accused Is the biological father of the infant delivered by PW4 had indeed corroborated
B PW4 testimonies. PW4 even cried, while giving her evidence and this is also part of corroboration.

24. In *Ku Lip See v. PP* [1982] 1 MLJ 194 , the Accused was convicted on a charge of rape, the Trial Judge accepted the evidence of the victim that she was raped was corroborated by the medical evidence.

C Applying the above cases, the evidence of PW4 that she was raped is corroborated by the DNA report. Apart from that PW4 positively identified the Accused as the person who had raped her. PW4 without any hesitation pointed at the Accused when she was asked to identify the person who raped her.

D 25. Furthermore, there was no reason to disregard the testimonies of PW4. I am satisfied that she is the witness of truth and credible witness after having had the opportunity of observing her demeanour in court.

Mindful of *Ku Lip See v. PP* (*supra*) and *Shahmirul Bin Salleh v. PR* (*supra*), I find that it is safe to convict the Accused in this case based on the testimonies of PW4 as well as the testimonies of the Prosecution's
E witnesses including the medical evidence tendered in Court.

26. Having had the privilege of listening to the evidence of PW4 and the other prosecution witnesses and having had the opportunity of observing their demeanour in court, DW1 did not come across to me as a credible witness.

F

I therefore do not consider DW1 evidence to be of any value in determining whether the Accused has successfully cast any reasonable doubt to the Prosecution's case.

27. "Reasonable doubt" had been defined in the case of *PR v. Saimin* (1971) 2 MLJ as follows: ...

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28. In the present case, I have warned myself of the danger of convicting on uncorroborated evidence and I was ready to convict the Accused as he had failed to rebut the case for the prosecution as to his guilt and based on the credible and consistent evidence of the victim.

H 29. I have given full attention and consideration of the whole of the evidence led by the Prosecution and the Defence. After having considered all the evidence to a maximum evaluation, I find that the Prosecution has proved its case beyond reasonable doubt on the following conclusions:

i. PW4 was raped;

I ii. PW4 positively identified that the Accused as the person who had raped her;

iii. The Court believed and accepted the testimonies of PW4 that the Accused had sexual Intercourse with PW4;

iv. that PW4 was under 16 years old at that material time;

v. PW4 is a credible witness and she is the witness of truth;

vi. PW4's evidence that she was raped was corroborated by medical evidence. The DNA report confirmed that the Accused is the Biological father of the infant which was delivered by PW4 on 05.02.2012;

vii. PW4's consent or otherwise was immaterial as she was underage at that material time;

viii. PW4's evidence that it was the accused who raped her was believed and accepted;

ix. the Prosecution had proven the elements of the charge beyond reasonable doubt;

x. The explanation by the Accused had not raised a reasonable doubt to the Prosecution's case;

xi. The defence had failed to discredit the truthfulness of PW4 of being a victim of rape by the Accused;

xii. The Prosecution's witnesses are credible witness and they are the witness of truth. The Defence had failed to dislodge the truthfulness of the evidence of the Prosecution's witnesses.

30. Based on the abovementioned conclusions, the only verdict I can arrive at in respect of the 4 charges against the Accused, is a verdict of guilty. I am also satisfied that the accused failed to raise any reasonable doubt in my mind as to his guilt.

...

[50] We observed that having briefly summarised the testimony of PW4, the trial judge stated in the grounds of decision that:

(a) the testimony of PW4 was consistent despite vigorous cross-examination over a few days;

(b) he had no hesitation to agree with the prosecution that to say PW4 was making up the story was wholly unacceptable;

(c) he was satisfied the element of penetration was sufficiently established;

(d) agreed inconsistencies in the testimony of PW4 was reasonable and did not affect the prosecution's case;

(e) the appellant shifted blame on PW4;

(f) Dr Nurulhuda, the O&G specialist (PW8) had clarified that the conception without intercourse is not easy as it needs sufficient medical equipment;

(g) in any event, for the instant case he accepted the evidence of PW4 that she was raped by the appellant and it was corroborated by the medical evidence;

A (h) the fact PW4 cried while giving evidence was also part of corroboration;

(i) satisfied that PW4 was a witness of truth and was a credible witness after having had the opportunity of observing her demeanour in court and there was no reason to disregard her testimony;

B (j) having had the opportunity of observing his demeanour in court, DW1 did not come across to him as a credible witness, therefore did not consider DW1 evidence to be of any value in determining whether the appellant had successfully cast any reasonable doubt on the prosecution's case;

C (k) he had warned myself of the danger of convicting on uncorroborated evidence and was ready to convict the appellant as he had failed to rebut the case for the prosecution as to his guilt and based on the credible and consistent evidence of the victim.

[51] From that the trial judge made the findings set out in para. 29 of the D grounds of decision.

[52] We bore in mind that there were fundamentally two versions before the trial court: that of PW4 that she was raped on four occasions, and that of the appellant that there was no penile penetration and that penetration was only by PW4's fingers. As can be seen from the grounds of decision, the trial E judge was satisfied as to the credibility of PW4 as a witness, that there was corroborative medical evidence, and having warned himself of convicting upon uncorroborated evidence he was ready to convict the appellant because the appellant had failed to rebut the case for the prosecution as to his guilt and based on the credible and consistent evidence of the victim.

F **[53]** The grounds of decision, though replete with the legal terms and phrases, was somewhat disjointed and disconnected as to appear muddled or incoherent in its reasoning. We observed that:

(a) Though the trial judge had said there was corroboration, he stated he had warned himself of the danger of convicting without corroboration;

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(b) Having said so, he said it was because the appellant had failed to rebut the case for the prosecution as to his guilt and based on the credible and consistent evidence of the victim.

[54] Reading the grounds of decision, it became evident the trial judge had H found from the audio visual advantage of a trial judge that:

(a) PW4 was credible and therefore accepted all of her testimony; and

(b) having had the opportunity of observing the appellant's demeanour as DW1 in court, the appellant did not come across to him as a credible I witness,

therefore did not consider the appellant's evidence to be of any value in determining whether the appellant had successfully cast any reasonable doubt on the prosecution case.

[55] The case that comes to mind is *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169 SC where it was held that even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution's case. The reasoning, confined to acceptance of credibility and warning as to danger of convicting without corroboration, fails the test in *Mohamad Radhi Yaakob v. Public Prosecutor* (*supra*) which requires a consideration whether the appellant's explanation did or did not cast a reasonable doubt. It applies:

(a) an objective evaluation as to whether a reasonable doubt was raised, as opposed to

(b) believing and accepting as true and correct the testimony of one witness against another upon a subjective finding of credibility based on observation of demeanour and dismissing the opposing version.

[56] The finding of credibility of PW4 necessarily results from the audio-visual advantage the trial judge had of the demeanour of PW4. The record contains no record as to the demeanour of the PW4. Section 271 of the Criminal Procedure Code provides:

> 271. Remarks as to demeanour of witness
>
> A presiding Magistrate recording the evidence of a witness may, at the conclusion of the evidence and at the foot of the notes of it, record such remarks, if any, as he thinks material respecting the demeanour of the witness while under examination.

[57] In *Tara Singh & Others v. Public Prosecutor* [1948] 1 LNS 70, [1949] MLJ 88, Spenser-Wilkinson J in the Court of Criminal Appeal, said:

> It has been laid down, however, that 'an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question' [See judgment of Lord Greene, MR in *Yuill v. Yuill* [1945] 1 All ER 183]. This was a civil case and the principle applies with even greater force to criminal cases, especially where, as usually happens in this country, the witness is a non-European giving evidence in his native tongue through interpretation.

[58] This was followed by Yusof Abdul Rashid J in *Public Prosecutor v. Ku Lip See* [1980] 1 LNS 166.

[59] The impression as to demeanour from the audio-visual advantage is something not easily capable of being scrutinised directly not only on appeal, but such impression may be affected from any delay made in assessing and noting that demeanour. Hence, s. 271 of the Criminal Procedure Code provides for it to be noted at the end of the notes as to that witness's testimony. Without such a contemporaneous note at the end of the notes of

A a witness as to demeanour as a basis or reason, references to demeanour to support a decision suffers from the impression of likelihood it is more of excuse to support the decision.

[60] In the circumstances, the finding as to credibility of PW4 based upon demeanour from the audio-visual advantage of the trial judge is flawed and
B unsafe.

[61] In this case, Justina Lau Sie Wei (PW1), the medical officer in the Paediatric Department, testified the child was born at 34-35 weeks gestation. Dr Nurulhuda (PW8) reported it was about 32 weeks gestation. It has a direct bearing as to which incident in the four charges could have resulted
C in the conception. The appellant alleged penetration was not by penile but by fingers penetration. The possibility of conception by insemination by delivery of semen by fingers was put to PW1, a medical officer testifying for the first time. Her answer was she had not heard of any case report of fertilisation taking place other than by sexual intercourse. In her reply, she
D remarked pertinently that "... If it can be done so easily then we do not need artificial fertilisation." Given her experience her answer that she had not heard as such is not definitive as to whether it could happen. We took it she meant that fertilisation taking place other than by sexual intercourse needs to be done in a conducive environment at the specialised medical facilities.

E **[62]** Dr Nurulhuda (PW8) testified in cross-examination:

Q15: In a normal case where the woman [is] fertile and [the] man is fertile, conception can occur as long as semen b[e]aring the spermatozoa is introduced to vagina?

F A: Yes, that possible.

Q16: You don't actually need to supervise medical process as in the intrauterine insemination if they are fertile?

A: Possible.

G **[63]** In re-examination, PW8 testified:

Q5: Can the conception occur if the sperm is placed just at the mouth of the vagina?

A: No, it must be placed within the vagina at the very least.

Q6: How about the percentage of success in intrauterine insemination?

H A: Roughly between 4% to 16 %. Very low.

Q7: Can this process being done without medical facilities?

A: No.

Q8: Refer to Q8 A No. 11 of cross-examination. Can you confirm that
I if a freshly ejaculated semen laden with spermatozoa is introduced to the vagina by the finger inserted, could conception occur?

A: It is possible.

DPP: No further question.

[64] There was no other conclusion that the DPP accepted the prosecution witness's answer to re-examination question Q8. Even if the public wisdom is that other than penile penetration and introduction of semen, fertilisation occurs only by medically supervised insemination, there was confirmation by the prosecution's own expert witness, PW8, in a direct answer in re-examination and accepted by the DPP, that if a freshly ejaculated semen laden with spermatozoa is introduced to the vagina by the finger inserted conception could occur.

[65] Subsequent to this, no further evidence was adduced by the prosecution that PW8 was incorrect. We puzzled over these unusual testimony and what it means. Evidently, it means that even if fertilisation is even less likely to be successful by means of delivery of fresh semen by fingers compared to medically supervised insemination, it nevertheless was possible.

[66] To determine whether a reasonable doubt was raised, we sought assistance from established case law authority. What constitutes a reasonable doubt in an objective evaluation is a precise concept. The Federal Court (see *State Public Service Commission, Sarawak v. Sarjit Singh Khaira* [2000] 4 CLJ 245 FC; *Tan Boon Kean v. PP* [1995] 4 CLJ 456 FC; *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2015] 2 CLJ 145 FC; *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579 FC) and the Court of Appeal and High Courts had time and again found assistance from *Miller v. Minister of Pensions* [1947] 2 All ER 372 where Denning J (as he then was), explained the proof beyond reasonable doubt standard as follows:

> Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[67] We bear in mind PW8 confirmed in re-examination that fertilisation is possible by the delivery of fresh semen by fingers. At that point, although fertilisation by such means was confirmed possible by PW8, the delivery of fresh semen by fingers was purely a supposition or proposed explanation. If there was no testimony as to delivery by fingers, the ground would remain a supposition and we would have dismissed the appeal on the ground no reasonable doubt was raised.

[68] But when the appellant testified as to fingers having been used to rub and introduce freshly ejaculated semen, possibility by such means in this case was no longer mere supposition, because there was evidence to be considered as to whether it raised a reasonable doubt.

[69] Similarly, the version of the appellant when he testified, if on its own, without the confirmation of PW8 that fertilisation by such means was possible, would appear in our minds to be a supposition or proposed explanation, a fanciful possibility to deflect the course of justice. If there was nothing more, it would fail, and we would dismiss the appeal.

[70] The appellant as DW1 testified that PW4 asked for sexual intercourse with him but though he touched her vagina, he did not have intercourse because her vagina was too small, that PW4 held his organ until he ejaculated. His hand or finger had semen after he ejaculated, and while he continued to touch her vagina she touched his semen, and they both inserted their fingers into her vagina.

[71] We examined the following cross-examination:

> Q10. And the chemist report said that you are the biological father of the baby delivered by XXX, what could you say?
>
> A. I disagree because I did not have sexual intercourse with XXX.

[72] In the light of the conclusiveness of the DNA that he was the biological father, we can only conclude that it was the answer of an ordinary person who did not expect that use of fingers could result in fertilisation and conception. The facts on the record is that matter came to PW3's attention only when the child was born. Even so, it was PW3 and not PW4 who lodged the police report, and that police report was made one month after the birth of the child. We concluded only it was the unexpected birth of the child that brought the matter to light. We dismissed from our minds any speculation as to what was going on.

[73] Though the appellant's version appeared to be shifting blame to PW4, we do not think the comment is necessary. It distracts from the process of a maximum evaluation on an objective basis.

[74] We remained guided by the Supreme Court in *Mohamad Radhi Yaakob v. Public Prosecutor* (*supra*) where it was held:

> We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial Judge must in accordance with the principle laid down in *Mat v. PP* [1963] 1 LNS 82 go one step further before convicting the accused by giving due consideration as to why the defence story though could not be believed did not raise a reasonable doubt on the prosecution case. Thus, even though a Judge does not accept or believe the accused explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case.

[75] Upon a maximum evaluation of the whole of the evidence before the court, the supposition that fertilisation occurred in this case by the introduction or delivery of semen by fingers, was no longer "but not in the

least probable", but became a reasonable doubt because to the testimony of PW8, there was the testimony of the appellant, properly having been laid out in cross-examination of the medical officers, that fingers had been so used. The confirmation by PW8 made the challenged but unshaken testimony of DW1 at the very least probable as to raise a reasonable doubt. The sole basis that gave rise to a reasonable doubt has nothing to do with belief in the version of DW1, but that PW8's testimony is that DW1's version was possible.

Concluding Remarks

[76] Reviewing the case as a whole, it was clearly a case that the defence of the appellant was put to the prosecution witnesses. The prosecution had notice of the defence. A material prosecution witness PW8 testified that fertilisation of ova by introduction of fresh semen by fingers was possible. No steps were taken to call a more experienced doctor to give evidence to explain away the testimony of PW8. There is no excuse on the record for not obtaining expert evidence that could be called to counter it. The court is left with one inference, that the prosecution accepted the confirmation by PW8 and the result must follow.

[77] Perhaps it is never too late to observe that since the burden at all times remain upon the prosecution to prove the offence as charged to the standard of beyond reasonable doubt, no charge should be filed for prosecution unless and until the prosecution is certain it could do so. There is after all no statute of limitation to crime.

[78] Finally, rape is even more of an outrage if it results in conception. Causing conception on a woman without her consent, or a minor who cannot consent, is an assault no less than rape resulting in conception. As we mentioned orally during submissions, steps ought to be taken quickly to add to the definition of rape.

[79] We did not think it appropriate to consider convicting the appellant on lesser charges such as of indecent assault lest it lends the notion and the courts stands accused that the courts condone such lesser charges as sufficient charge and punishment, and detract from the urgency of introducing necessary legislation. No doubt the prosecution felt compelled to charge for rapes with no alternative charges for the very same reason that lesser charges are wholly inadequate.

[80] For the reasons above, we allowed the appeal and set aside the conviction and sentence passed by the trial court as varied as to the order of compensation upon appeal to the High Court.